

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF WASHINGTON
3 AT TACOMA

4 UNITED STATES OF AMERICA,) Docket No. CR15-5351RJB
5 Plaintiff,) Tacoma, Washington
6 vs.) February 17, 2016
7 JAY MICHAUD,)
8 Defendant.)
9

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11 TRANSCRIPT OF MOTION HEARING
12 BEFORE THE HONORABLE ROBERT J. BRYAN
13 SENIOR UNITED STATES DISTRICT COURT JUDGE

14 APPEARANCES:

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25 Proceedings recorded by mechanical stenography, transcript
produced by Reporter on computer.

1 Wednesday, February 17, 2016 - 9:30 a.m.

2 (Defendant present.)

3 THE CLERK: All rise. This United States District
4 Court is now in session, the Honorable Robert J. Bryan
5 presiding.

6 THE COURT: Please be seated. Good morning.

7 This is United States versus Jay Michaud, No. 15-5351. It
8 is set this morning for hearing on the defendant's third
9 motion to compel. The defendant is present with his
10 attorneys, Ms. Sullivan and Mr. Fieman. And Mr. Becker and
11 Mr. Hampton are here for the government.

12 The first order of business is a surreply. The government
13 has filed a motion for leave to file a surreply. I gather the
14 defense objected.

15 MR. FIEMAN: Yes, Your Honor. You probably already
16 read it already and we are prepared to address it, so we can
17 note our objection.

18 THE COURT: I think it is proper to allow it. So I
19 have signed the order authorizing that.

20 Now, in preparation for this proceeding I have read your
21 briefing, all of it twice, and reviewed some things in the
22 file. I guess this goes back to the hearing that we had on
23 the 14th of December where I thought this issue was resolved
24 at that time.

25 Mr. Fieman indicated that the government had notified them

1 that the government was in fact willing to turn over the NIT
2 code. The government, in the pleading, filed on the 5th of
3 January, said the government has agreed to provide to the
4 defense and its expert certain information related to a
5 court-authorized Network Investigative Technique.

6 I guess I take it from those two things that you didn't in
7 fact have an agreement to provide all of the code. Is that
8 what leads to this motion to compel?

9 MR. FIEMAN: Your Honor, I thought we had an
10 agreement, but apparently we did not have a meeting of the
11 minds. I don't want to second-guess what the government's
12 understanding was, but I would note I did put on the record at
13 that hearing our understanding, and there was no qualification
14 or comment from the government that we were only going to be
15 getting a fraction of the information. So I was surprised by
16 the government's position, but they staked it out and I guess
17 we need to move forward.

18 THE COURT: Yes, okay.

19 Well, it is your motion, Mr. Fieman, so anything you want
20 to add to your briefing.

21 MR. FIEMAN: Thank you, Your Honor.

22 So Your Honor, I will be brief, but I do want to make a
23 few points, in particular, in response to this surreply.

24 I would like to just start with the basic premise here and
25 Local Criminal Rule 16 which specifically sets the standard at

1 open and early discovery. As I indicated, I thought we had
2 reached an agreement on the code.

3 The government's objections at this point are a little
4 hard for me to grasp because the code itself, is not a
5 classified document. They are not claiming there's any
6 classified information in there. They are not making a
7 national security claim. There's no confidential informant
8 information. There's been no claim that disclosing the code
9 would place agents at risk.

10 In fact, I have seen nothing but just sort of a bold
11 assertion of the law enforcement privilege. But the threshold
12 showing of why there's potential harm, I am still at a loss.
13 They would not have to disclose the code itself in order to
14 explain, in lay person's terms, what the harm would be.
15 That's a separate issue. So I am still a little bit puzzled
16 by the government's position.

17 Let me just address briefly the surreply. I understand
18 really there's two points that are made there. One is that
19 they've offered to give us something called the data stream,
20 which is basically a copy, more or less, of information we've
21 already received that shows Pewter's alleged activities and
22 the data associated with that.

23 When that offer was made, I consulted with both our
24 experts, and frankly their position was this is a red herring;
25 this has nothing to do with the code components that we are

1 talking about.

2 For example, the data stream, which is a copy of the data
3 they've said we've received already is, just to give one
4 example based on this identifier information that is attached
5 to it, Mr. Tsyklevich, on page 3 of his declaration,
6 explained how this identifier information is frequently
7 inaccurate and readily corrupted, and therefore giving us the
8 data stream doesn't address our chain of custody or trial
9 defense issues whatsoever. And I explained that to the
10 government.

11 I would also note that Agent Aflin is not a code expert.
12 He's somebody who was involved in the investigation. And I
13 have not heard or seen anything from the government that
14 directly challenges either Dr. Soghoian's testimony about what
15 the NIT can do to security settings, or Mr. Tsyklevich's
16 declaration. I certainly thought that if they were going to
17 file a surreply, that we'd see some contesting of maybe our
18 expert's qualifications or assertions or his security
19 clearance.

20 They seem to have no objection to our expert, and they
21 have not challenged our expert's statements directly. This
22 data stream issue is indeed a red herring.

23 I would note, Your Honor, also that we've cited *Budziak*,
24 the Ninth Circuit authority, that even if those assurances
25 were taken at face value, we are clearly not required to rely

1 on them. This is a case that depends almost entirely on data,
2 tracking of data, possession of data.

3 As the Ninth Circuit said in *Budziak*, we cited this in our
4 reply at page 6, access to the software, in this case code, is
5 crucial to a defendant's ability to assess the program and the
6 testimony of agents who build the case against them is
7 obviously relevant and material to the defense.

8 The other surreply point, as I understand it, and really
9 this would be solely if it didn't need to be addressed, but
10 what their point is, that the images that are alleged, in
11 Mr. Michaud's defense, were ultimately found on thumb drives.

12 Well, thumb drives don't connect to the Internet, and
13 images don't drop on to thumb drives out of the air. The only
14 way data or images get on thumb drives is that if those thumb
15 drives were connected to a computer.

16 So any of the security overrides or virus issues that are
17 clearly going to be essential to our defense pertain to the
18 thumb drives just as much as the hard drive. They are just
19 simply a different area on the computer that is removable to
20 store information.

21 With all due respect, that is simply not a relevant
22 response to this case. Again, in *Budziak*, the Ninth Circuit
23 emphasized that the Court itself should not defer to the
24 government's assurances. Obviously we need to do this
25 independently.

1 So let me get back to what I am trying to understand is
2 the government's problems here. We agreed to the security
3 procedures that they requested. We have one expert whose
4 qualifications and discretion they have not challenged, who is
5 willing to view this stuff at a government facility. So they
6 don't even have to hand him a copy of this stuff.

7 They proposed a protective order which the Court signed
8 off on, that is in place and we do not object to. And so I am
9 puzzled where the security risk is. Apart from the fact they
10 haven't shown a harm by disclosing the code to us, there has
11 been no discussion or no recitation to the fact that the
12 measures they requested we've agreed to, and even if there
13 were potential harm, are adequately addressed by what the
14 Court has already issued in the code protective order; it is
15 an independent order.

16 So Your Honor, really what it comes down to is this idea
17 of relevance. The government itself in its pleading says
18 evidence is material under Rule 16 if it is helpful to a
19 possible defense.

20 In fact, the Ninth Circuit's standard is substantially
21 broader than that. It is helpful even if they've allowed us
22 to investigate and focus or eliminate potential defenses. But
23 the government recognizes, I think, that this is relevant.
24 And then the real issue: Are these security precautions
25 adequate?

1 If the government wants additional precautions, we have
2 invited them to suggest those. We are not looking to
3 circulate this stuff. We just need to look at it.

4 Finally, Your Honor, I would point out that I am
5 concerned -- a little bit of a preview we got during the
6 hearing about what I saw as a sword and shield element. We
7 went forward at the hearing based upon a very -- just partial
8 code information we got, primarily based on the government's
9 assurances that the material we've gotten was sufficient and
10 relevant for that hearing.

11 Then Dr. Soghoian is following up on Agent Alfin's
12 testimony about how NITs works, and we get the objection, well
13 he didn't look at the code.

14 It puts us in a very difficult position. I respectfully
15 submit this is going to get much worse at trial because
16 basically everything that they are putting in is related to
17 this computer and its security provisions and their ability to
18 indicate who was on the computer or who downloaded on this
19 computer, whose activities were on the computer.

20 So, Your Honor, I think this is actually fairly
21 straightforward because we have agreed to all their security
22 provisions. It is obviously relevant evidence. And unless
23 the Court has any specific additional questions about how we
24 would handle this or other concerns, I would stand again on
25 the rest of our pleadings.

1 THE COURT: Okay. Mr. Hampton.

2 MR. HAMPTON: Good morning, Your Honor. I think it
3 is important in understanding this motion that the defense
4 maintains that the evidence they seek -- the information they
5 seek is obviously relevant. That's certainly -- if that were
6 true, we might have a different case, but I don't think it's
7 obviously relevant.

8 If we look at the pleadings we see that, from the defense
9 prospective, that identify four questions, and I think they
10 say this information is necessary.

11 So first the defense would say, well, how do we know the
12 unique identifier was unique? We have to see who generated
13 it, because we don't know if it is unique. If we don't know
14 it's unique, then we don't know if the information that we
15 believe is associated with Mr. Michaud, we don't know if that
16 is accurate.

17 Well, Your Honor, the government checked the database.
18 The identifier assigned to Pewter as a result of the NIT was
19 unique. The identifiers for all the targets of the
20 investigation were unique.

21 The defense also says, well, we need to know if the NIT
22 data were accurate. The government has provided the data that
23 we obtained as a result of the NIT, the IP address, the MAC
24 address, the other information that was stored in our database
25 and that we've received.

1 The government has provided the code, as it agreed to
2 provide, the code that generated that data, so that the
3 defense and its expert can evaluate whether in fact that code
4 could have generated the data that we have.

5 And the government has offered to provide to the defense
6 the network stream, the packet information that was
7 transferred from Mr. Michaud's computer when the NIT was
8 active, to the government controlled servers, which recorded
9 that data.

10 So if what Mr. Michaud and what the defense wishes to do
11 is to verify, as they say in their reply, that the information
12 that the government obtained as a result of the NIT and that
13 resulted in its identification of Mr. Michaud were in fact
14 accurate, the defense has the tools that they need to do that.

15 The third question that the defense asks is, well, what if
16 the government sent something else, the government sent some
17 other program and it seized some other information or
18 conducted some other searches on Mr. Michaud's computer?

19 Well, first of all, we didn't; the government didn't. The
20 government sent the NIT. The NIT obtained, I believe, six or
21 seven unique pieces of information pursuant to a warrant. It
22 sent that information back to the government. And that is the
23 information the government has disclosed to the defense.

24 But even if there is some other data that were seized, the
25 government isn't relying on that. We haven't proffered any

1 evidence based on that. If we did, certainly the Court could
2 and should take appropriate action; that would not be proper
3 for the government to sandbag the defense in that way. We are
4 saying we don't have other information. That is true and
5 accurate based on what we know at this time. And I don't see
6 any justification for second-guessing that.

7 The fourth question, and it is related really to the third
8 question: Well, what if someone else is responsible for the
9 child pornography on Mr. Michaud's devices? What if someone
10 else, whether the government or some other entity, put a virus
11 on his computer or allowed that child pornography to get
12 there? Well, again, the government didn't do that. And if
13 someone else did, it would seem that the defense ought to be
14 able to come up with some justification for that theory in the
15 devices that are available to them, the data, the forensic
16 images of those devices, the forensic image of Mr. Michaud's
17 computer.

18 So far as I understand it, they haven't yet done their
19 full forensic investigation of that evidence. So the defense
20 isn't saying, well, I've looked and I can't tell and here's
21 why. They just haven't done that yet. They rather, in fact,
22 look at the information that they say we have.

23 Now, the defense has also, I think in some ways, turned
24 this inquiry on its head. They seem to be taking the position
25 that they are entitled to this information, we haven't shown

1 why we shouldn't give it over. But that is actually not how
2 discovery generally works. The defense has to demonstrate
3 some entitlement to the information, which we maintain they
4 haven't done.

5 Now, in this instance, if the Court were persuaded that
6 the defense has made some showing, the government does have
7 grave concerns about disclosing the information that is
8 requested. And I will get to that at the end. But we do
9 believe there would be harm and we will articulate that.

10 But as to this notion of materiality, I simply don't
11 believe that the defense has made a showing, nor does the
12 *Budziak* case change things.

13 In that case, the software program and software code that
14 was at issue was absolutely central to the issues at trial.
15 The defendant had stipulated to all the other elements of the
16 offense -- the offense was possession of child pornography --
17 and I believe all the other elements of distribution, except
18 for the distribution itself.

19 So that law enforcement software program, where the
20 undercover downloaded child pornography from the defendant in
21 that case, it was critical. It was critical to the
22 government's proof. It was critical to the case. And so the
23 Ninth Circuit held that the government had to disclose more
24 information about that program, and that the district courts
25 could not simply rely on the government's assurance it didn't

1 matter.

2 Here, we have a very different case. The information
3 obtained by NIT does not go to the core of this case. It is
4 not required to prove the essential elements of the offenses,
5 possession of child pornography and receipt of child
6 pornography.

7 It is relevant. I don't mean to say that it is not. It
8 is certainly true that if there were some inaccuracy in the IP
9 address, that could present a problem. The IP address was how
10 the government identified the defendant. It is how it
11 obtained the search warrant in this case. But in terms of a
12 trial, that information, the IP address, the MAC address, it
13 certainly explains why the government did what it did. And it
14 would no doubt be part of the narrative, or could be part of
15 the narrative in the government's case, but it is not required
16 to prove the essential elements of the charges, certainly not
17 as to the possession.

18 So I don't think that the Ninth Circuit's opinion has a
19 lot of bearing on this case and how the Court should resolve
20 this particular dispute.

21 And that brings me to the final matter, which is the
22 matter of the law enforcement privilege. And the government,
23 as the Court -- sorry, the government is aware and has, both
24 in the defense's reply and the remarks of the Court, it
25 understands the concern about the notion of an ex parte

1 in-camera hearing, and it understands why there is discomfort
2 with that.

3 It also understands that to this point the government's
4 articulation of the harm, the reason it is so deeply concerned
5 about further disclosure related to the use and deployment of
6 the NIT has been, I think, at best, circumspect. And
7 unfortunately that is in part due to the nature of the
8 information and what the government is worried about
9 disclosing.

10 What the government is prepared to do at this time is, to
11 the extent the Court believes it would be necessary to
12 consider these issues, consider the law enforcement privilege.
13 The government does have an affidavit from a special agent
14 with the FBI and the government would propose filing that
15 under seal, if the Court will take it under seal. The
16 government will also, rather than provide it ex parte, would
17 be willing to provide a copy to the defense subject to the
18 existing NIT protective order, and that is how we would
19 propose to proceed.

20 We would simply ask, after the Court reviews the
21 affidavit, if it concludes that it does not wish to file it
22 under seal, then the government would wish to withdraw that
23 affidavit. It does not want it in the public record. But
24 given that it would be produced subject to the protective
25 order, it has no problem with the defense keeping a copy.

1 So Your Honor, if I may approach.

2 THE COURT: Wait a minute, I want to hear on that.

3 MR. FIEMAN: Your Honor, obviously we can proceed
4 this way, we have no objection. Really our objection is why
5 didn't we do this last week so I could come in and make an
6 informed presentation, talk to my experts. You know, we have
7 been harping on this from the beginning --

8 THE COURT: We are doing it now.

9 MR. FIEMAN: Yes, thank you, Judge.

10 THE COURT: It may be filed under seal and remain
11 under seal and under the protective order that is in place.

12 MR. HAMPTON: Your Honor, may I approach?

13 Your Honor the defense's point is well taken. This is not
14 an effort on the part of the government to delay
15 unnecessarily, but as I would hope the Court and the defense
16 will understand, these issues are important. They have high
17 stakes. And the government has been working hard speaking
18 with -- it is not simply Mr. Becker and myself who have to
19 make these decisions, but our management, and more importantly
20 management within the FBI and the law enforcement agencies who
21 care deeply about these issues. So we are doing our best.

22 MR. FIEMAN: Your Honor, I withdraw any objection to
23 the submission of this affidavit.

24 THE COURT: I am sorry --

25 MR. FIEMAN: I withdraw any objection to the

1 submission of this affidavit.

2 THE COURT: All right. Well, let me read it.

3 (Pause.)

4 THE COURT: Okay.

5 MR. HAMPTON: Unless the Court has any further
6 questions, I don't have anything further to add.

7 THE COURT: Mr. Fieman.

8 MR. FIEMAN: Thank you, Your Honor. I withdrew my
9 objection because I don't see anything here that adds to what
10 we already know.

11 The discussion here is about disclosure to the public or
12 in open court. We are not asking for that at this point. We
13 are asking to follow the government's protective order, which
14 is extraordinarily restrictive. I mean, we are sending one
15 expert to an FBI office to look at the code.

16 I do not see any challenge here to our expert's assessment
17 of the relevance. It seems to be largely a restatement of the
18 government's existing position.

19 And Your Honor, I would note we appreciate the
20 government's assurances. It is not an issue about their
21 personal integrity. But so often, when the defense has found
22 issues, particularly in these data-driven cases that have
23 extraordinary impact, I would refer the Court to our case, the
24 Robert Lee case in front of Judge Leighton, there was
25 tremendous resistance to turning over the software there. We

1 ended up going with a virus infection defense that resulted in
2 acquittal of five out of the six charges. So we have some
3 experience with materiality.

4 I would note, Your Honor, we can't reverse engineer this.
5 We have consulted with all of our experts. The one thing
6 particularly that's not discussed here is the security
7 overrides. We know from Dr. Soghoian's testimony that
8 basically the fences were down from this malware, and we
9 cannot reverse engineer it until we know exactly what security
10 provisions were overridden, including what thumb drives may
11 have been infected.

12 So, Your Honor, starting with the presumption that
13 discovery is appropriate, is relevant, we ask the Court to
14 just pursue the protective order that is already in place.

15 Our only additional request, if you are inclined to rule
16 in our favor, Your Honor, is that we do believe this has been
17 dragged out since -- really since September when we made the
18 initial request, and we ask this be done expeditiously.

19 THE COURT: Well, first I am satisfied that the
20 defense has shown materiality here to preparing the defense.
21 I don't need to discuss that in depth, in my view. I think
22 the papers speak for themselves. And it may be a blind alley,
23 but we won't know until the defense can look at the details of
24 what was done.

25 So far as the privilege is concerned, what has been

1 presented is nothing more than a showing that disclosure could
2 possibly lead to harmful consequences. I think that is not
3 sufficient to justify a separate hearing as originally was
4 requested, and I think the affidavit filed basically says the
5 same thing that the government said in their brief on page 13,
6 that disclosure could possibly lead to a variety of harmful
7 consequences.

8 It is my opinion that the protective order in place is
9 sufficient to protect this information, and it is my judgment
10 that the motion should be granted. The material requested
11 should be submitted, but under the terms of the protective
12 order in place.

13 If there are other additions or changes that need to be
14 made to the protective order, you can discuss that and submit
15 those things to me. That is my ruling on this matter.

16 Now, you know, behind that ruling is this: The government
17 hacked into a whole lot of computers on the strength of a very
18 questionable search warrant. I ruled on the admissibility of
19 that in what I considered to be a very narrow ruling.

20 Much of the details of this information is lost on me, I
21 am afraid, the technical parts of it, but it comes down to a
22 simple thing. You say you caught me by the use of computer
23 hacking, so how do you do it? How do you do it? A fair
24 question. And the government should respond under seal and
25 under the protective order, but the government should respond

1 and say here's how we did it.

2 So, you know, I guess what I am saying is that this whole
3 thing didn't seem that complex to me. I respect the
4 government's position in trying to keep this under wraps. I
5 think it can be done by the protective order adequately.

6 So the defendant's third motion to compel discovery is
7 granted. Do you have something else, Mr. Hampton?

8 MR. HAMPTON: Your Honor, could we have just a
9 moment? We may have a question.

10 (Pause.)

11 MR. HAMPTON: Your Honor, in light of the Court's
12 ruling, both Mr. Becker and I will need to consult with our
13 supervision. We will also need to consult with the FBI, as I
14 think there may be real reluctance to be able to produce any
15 of this material.

16 So I wonder if the Court could set a timeframe, perhaps in
17 two weeks, so we can report to the Court whether or not we can
18 comply with the Court's order.

19 THE COURT: It seems to me you can either produce it
20 or move to dismiss. You are going to have the same problem in
21 the other 130 cases, whatever you have, based on the same
22 information.

23 But I think that is a reasonable request, in light of the
24 long delay in trial that I guess we have all agreed to, a
25 couple of weeks.

1 MR. FIEMAN: I strongly object, Your Honor. Without
2 involving the Court in the government's settlement proposals
3 and everything, again, frankly from our perspective, this is a
4 delaying tactic to try and force Mr. Michaud to make a choice
5 on the five-year mandatory minimum on the receipt or try and
6 take some other option. They set deadlines on that. And
7 frankly they are trying to run out the clock on some of our
8 options.

9 I would ask the Court to just let its order stand. We'll
10 work out the timing. If we can't work out the timing, then we
11 would revisit.

12 THE COURT: I am not involved in your settlement
13 negotiations. But it seems to me that those things should
14 also be -- any artificial deadlines set by the government
15 should also be set over.

16 MR. FIEMAN: Thank you, Your Honor.

17 THE COURT: But they don't have to do what I suggest
18 to them in that regard.

19 There's also, of course, always a possibility of an
20 interim appeal or whatever. But you know, do whatever you
21 think is right.

22 MR. HAMPTON: Well, Your Honor, then I guess the
23 parties will -- the Court's order will be entered today and
24 the parties will proceed accordingly.

25 THE COURT: I am sorry, I didn't hear that.

1 MR. HAMPTON: Since the Court's order will be entered
2 today and the parties will proceed accordingly, we will
3 consult with our supervision and the FBI and make a decision
4 as quickly as we are able.

5 THE COURT: Yes. Well, you know, it is of
6 questionable propriety for me to get into settlement
7 negotiations, but it would be a damn dirty trick if the
8 government is using these discovery issues as a weapon to
9 force a decision on a plea agreement before things are
10 resolved. So you can do what you want, I guess.

11 The motion is granted and we'll go from there.

12 MR. FIEMAN: Thank you, Your Honor.

13 MS. SULLIVAN: Thank you, Your Honor.

14 THE COURT: Ordinarily, the clerk will enter a minute
15 order that I have granted the motion subject to the protective
16 order. That is all the order that you need.

17 MR. FIEMAN: Thank you, Your Honor.

18 MR. HAMPTON: Thank you, Your Honor.

19 (Proceedings concluded.)

20 * * * * *
21 C E R T I F I C A T E

22 I certify that the foregoing is a correct transcript from
the record of proceedings in the above-entitled matter.

23 /S/ Teri Hendrix
24 Teri Hendrix, Court Reporter

February 17, 2016
Date

25